Supreme Court, U.S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1791

LARRY C. FLYNT,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Did the trial court correctly exclude evidence which was neither relevant nor probative?

2.

Did the Georgia Court of Appeals correctly hold the magazines Hustler and Chic obscene under Miller v. California?

STATEMENT OF THE CASE

Petitioner was convicted in the State Court of Fulton County, Atlanta, Georgia, on eleven counts of distributing obscene material.[1/] During his trial, Petitioner attempted to introduce certain evidence relating to contemporary community standards. Specifically, Petitioner sought to introduce evidence of (1) the results of an opinion poll concerning the attitudes of Fulton County residents toward publications depicting nudity and sex, (2) the distribution of publications similar to Hustler and Chic within Fulton County, (3) the availability of sexually explicit material in the Fulton County libraries and at various other locations within Fulton County, and (4) the availability of sexually explicit material at various locations throughout Fulton County. The evidence was excluded because it was irrelevant to the issues before the court.

The Georgia Court of Appeals affirmed the Petitioner's conviction on January 15, 1980. On March 14, 1980, the Supreme Court of Georgia denied the Petitioner's application for a writ of certiorari.

[1/] Specifically, the obscene material included eight issues of Hustler and three issues of Chic, both magazine publications.

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE WHICH WAS NEITHER RELEVANT NOR PROBATIVE.

For evidence to be relevant and admissible it must "relate to the questions being tried by the jury and bear upon them either directly or indirectly." Ga. Code § 38-201. In the present case, Petitioner failed to establish that the evidence excluded met that test.

OPINION POLLS

The survey conducted by Dr. Charles Winick, which Petitioner sought to introduce into evidence, contained four questions ostensibly related to community standards: (1) "Do you agree or disagree that adults who want to have the right to read and obtain publications depicting nudity and sex?" (2) "Is it all right or not all right for adults who want to to read and obtain publications depicting nudity and sex?" (3) "In your opinion, have standards changed in recent years so that depictions of nudity and sexual activities in movies and publications available only to adults are more acceptable or less acceptable?" and (4) "We have used the words nudity and sex in the preceding questions. What we mean by these terms includes exposure of the genitals and sexual activity. Is that what you understood we meant, or did you think we meant something else?" These questions may be relevant to the issue of whether residents of Fulton County believe

consenting adults should be able to obtain sexually explicit material; they are not relevant to the issue presented in the present case, specifically, whether the eleven magazines are obscene under the test established in Miller v. California, 413 U.S. 15 (1973). As noted by the court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973), "[t]he sum of experience . . .affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively. . . ." Obscene material is simply not protected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). Therefore, in the words of the prosecutor in this case, the questions contained in this particular poll constitute "merely a feeble referendum of whether or not there should be obscenity laws and that is not an issue in this case." (T. 571).

Additionally, these questions inquire into attitudes toward nudity and sex; neither nudity nor sex is per se obscene. Jenkins v. Georgia, 418 U.S. 153, 161 (1974). Under Miller v. California, 413 U.S. 15, 24 (1973), the relevant inquiry is "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest. . . ."

Prurient interest means "a shameful or morbid interest in nudity, sex or excretion." Roth v. United States, 354 U.S. 476, 487 (1957). See also A.L.I. Model Penal Code § 207-10(2) (Tent. Draft No. 6, 1957); Ga. Code Ann. § 26-2101(b)(1). To be obscene, the material must also satisfy two other prongs of the Miller test in that it "depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law. . ." and in that ". . .the work taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 24. Generalized questions concerning "nudity and sex" are not relevant to the specific legal issues raised in the present case. Thus, although the results of properly conducted opinion polls have been admitted in certain jurisdictions, see, e.g., Zippo Manufacturing Company v. Rogers Imports, Inc., 216 F.Supp. 670 (S.D. N.Y. 1963), the results of this particular survey were properly excluded. Commonwealth v. Mascolo, 386 N.E.2d 1311 (Mass. App. 1979); Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. 1978).

THE ATLANTA NEWS AGENCY

Petitioner sought to introduce the testimony of Fay McCoy, the Chief Financial Officer of the Atlanta News Agency, in an effort to establish community acceptance by showing the distribution and availability within Fulton County of magazines similar to Hustler and Chic. Under the test established in United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974), adopted by the Georgia Court of Appeals in Flynt v. The State, 153 Ga. App. 232, 237, ___S.E.2d___(1980), such comparative

evidence is deemed to be relevant, probative, and therefore admissible if the offering party can show that the proffered evidence "(1) is similar. . .[to the material alleged to be obscene] and (2) enjoys a reasonable degree of community acceptance." United States v. Womack, 509 F.2d 368, 377 (D.C. Cir. 1974). Evidence of mere availability, however, is not sufficient to prove that the comparative evidence offered enjoys a reasonable degree of community acceptance. "[T]he mere fact that materials similar to the [material] at issue here 'are for sale and purchased at bookstores around the country does not make them witnesses of virtue.' . . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.' " Hamling v. United States, 418 U.S. 87, 126 (1974); see United States v. Manarite, 448 F.2d 583, 593 (2nd Cir.), cert. denied, 404 U.S. 947 (1971).

In the present case, the Georgia Court of Appeals found that magazines offered as comparative evidence were indeed similar to the eight issues of Hustler and three issues of Chic. Flynt v. The State, 153 Ga. App. 232, 239, ___S.E.2d___, (1980). On the issue of community acceptance, however, the witness from the Atlanta News Agency could not state that similar magazines which were distributed were actually sold. Since the distribution figures offered did not indicate what percentage of the magazines distributed were returned to the distributor unsold, the Atlanta News Agency testimony was not sufficiently probative to warrant a finding of community acceptance. The evidence merely indicated that similar magazines were available.

The Georgia Court of Appeals agreed that evidence of actual sales may be used to establish community acceptance, but found that no such evidence was offered in the present case. Flynt v. The State, 153 Ga. App. 232, 240, ___S.E.2d___, (1980). The witness from the Atlanta News Agency offered to testify to his prior knowledge of sales figures which was derived from examining the computer records of the Atlanta News Agency. Ga. Code § 38-203 provides "[t]he best evidence which exists of the fact sought to be proved shall be produced unless its absence shall be satisfactorily accounted for." Thus, the computer records themselves would have been the best evidence of sales figures and the trial court made it clear that the sales evidence would have been admitted if the records themselves had been offered. (T. 777-78). Trial counsel for the Petitioner fully understood the trial court's preference for the best evidence and stated "we are going to ask Mr. McCoy [the witness] to go back and get his records and we will put him on at another time." (T. 778). Later that afternoon, however, without questioning the witness again, Petitioner's counsel independently attempted to proffer that the computer records had been destroyed in the ordinary course of business and that therefore the witness' testimony was the best evidence. In order "[t]o complain of exclusion of evidence on direct examination the one who offers the evidence must show 'that a pertinent question was asked, that the court ruled out an answer, that a statement was made to the court at the time showing what the answer would be, and that such testimony was material and would have benefited the complaining party.' . . . (citations omitted)" Thompson v. Hill,

143 Ga. App. 272, 274, 238 S.E.2d 270 (1977).

In the present case, no pertinent question was ever addressed to the witness at a time when his testimony was being offered as the "best evidence." The independent unsworn offer made by counsel for the Petitioner was insufficient to compel the admission of the sales evidence.

THE TESTIMONY OF ATTORNEY ELOISE NEWHARD

The Petitioner attempted to introduce the testimony of attorney Eloise Newhard as to the availability of sexually explicit materials in the Fulton County libraries. Newhard had prepared photocopies of excerpts from various publications. Under Miller v. California, 413 U.S. 15, 24 (1973), "prurient interest" and "literary, artistic, political or scientific value" must be evaluated on the basis of materials "taken as a whole." Publications can hardly be shown to be similar to allegedly obscene materials merely because selected excerpts contain sexually explicit material. Such comparative evidence must also be "taken as a whole." Thus photocopies of parts of books from the Fulton County libraries cannot be used to satisfy the similarity requirement of United States v. Womack, 509 F.2d 368, 377 (D. C. Cir. 1974).

In addition, it is far from clear that just because material is available in public libraries it is reasonably accepted in the community.

Mere availability does not prove that there is community acceptance. Hamling v. United States, 418 U.S. 87, 126 (1974); United States v. Manarite, 448 F.2d 583, 593 (2nd Cir.), cert. denied, 404 U.S. 947 (1971).

Eloise Newhard also sought to testify concerning books she had purchased at Fulton County bookstores and drug stores. Once again, evidence that sexually explicit materials are available does not prove that they are accepted by the community. Hamling v. United States, 418 U.S. 87, 126 (1974); United States v. Manarite, 448 U.S. 947 (1971).

THE TESTIMONY OF DURWOOD MYERS, PRIVATE INVESTIGATOR

Petitioner sought to introduce the evidence of Durwood Myers, a private investigator, who had conducted his own survey of the availability of sexually explicit materials within Fulton County. Even assuming all of the materials surveyed were similar to the issues of Hustler and Chic involved in the present case, Myers' proffered testimony did not establish that such materials are accepted in the community. Like the testimony of attorney Eloise Newhard, Myers' testimony focused on availability as opposed to community acceptance and such testimony is insufficient to lay the foundation required by United States v. Womack, 509 F.2d 368 (D. C. Cir. 1974).

Petitioner was not denied the opportunity to present evidence; he was precluded from placing in the record a myriad of irrelevant material. The trial court correctly excluded that evidence which was neither relevant nor probative.

B. THE GEORGIA COURT OF APPEALS CORRECTLY HELD THE MAGAZINES HUSTLER AND CHIC OBSCENE UNDER MILLER v. CALIFORNIA.

Obscene material is not protected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973). In determining whether specific material is obscene, three basic factors must be examined: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). The "appeal to prurient interest" and "patent offensiveness" steps of the Miller test must be evaluated by the trier of fact in relation to "contemporary community standards." Smith v. United States, 431 U.S. 291, 300-01 (1977). "Literary, artistic, political or scientific value, on the other hand, is not discussed in Miller in terms of contemporary community standards." Id. at 301.

In order to satisfy the trier of fact that the allegedly obscene material meets the three prong Miller test, the state is not compelled to present expert testimony if the materials themselves are placed into evidence. This Court "has regarded the materials as sufficient in

themselves for the determination of the question. Ginzburg v. United States, 383 U.S. 463, 465 (1966); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973). It was made clear, however, in Jenkins v. Georgia, 418 U.S. 153 (1974), that juries do not have unbridled discretion in determining, for example, what is patently offensive. As the Court noted, "It would be wholly at odds with this aspect of Miller [the determination of patent offensiveness] to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." Id. at 161. Thus, Miller has been viewed as requiring appellate courts "to review independently the constitutional fact of obscenity." Id. at 163, (Brennan, J., concurring). Such independent review has been explicitly applied to the last two prongs of the Miller test and implicitly to the first. Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353, 1364 (5th Cir. 1980).

In evaluating the first prong of the Miller test, whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, the State of Georgia has defined "prurient interest" as "a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. § 26-2101(b)(1). Compare Roth v. United States, 354 U.S. 476, 487 (1958); A.L.I. Model Penal Code § 207-10(2) (Tent. Draft No. 6, 1957). The "taken as a whole" aspect of this first prong is to be applied in a qualitative rather than a quantitative manner. Ginzburg v. United States, 383 U.S. 463, 466, n. 5 (1966). Thus, in determining whether the

eleven magazines at issue in the present case appeal to a shameful or morbid interest in nudity, sex or excretion, a finding must be "based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested or excerpted in them." Id. After making an independent appellate review of the magazines involved in this case, the Georgia Court of Appeals found that they did indeed, taken as a whole, appeal to the prurient interest. Flynt v. The State, 153 Ga. App. 232, 246, ___ S.E.2d___ (1980).

The second part of the Miller test examines whether the material depicts or describes, in a patently offensive way, conduct which is specifically defined by relevant state law. The Court in Miller gave examples of what a state may regulate under this "patently offensive" prong of the test. 413 U.S. at 25. Jenkins v. Georgia, 418 U.S. 153, 160 (1974), contains examples of what juries might find to be patently offensive: "'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' and 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'" The Court further noted in Jenkins, 418 U.S. at 160-61, that "[w]hile this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to

such a determination." Accordingly, the Georgia legislature has enumerated depictions and descriptions of the following types of hard core sexual conduct for regulation:

> (i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
>
> (ii) acts of masturbation;
>
> (iii) acts involving excretory functions or lewd exhibition of the genitals;
>
> (iv) acts of bestiality or the fondling of sex organs of animals;
>
> (v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

Ga. Code Ann. § 26-2101(b)(3).

The record speaks for itself as to the existence of depictions and descriptions of such sexual acts. Examples include a picture of a woman being mounted by a dog from the rear (T. 612), an article describing "how a person can masturbate of woman with his fist." (T. 619), a picture of a man inserting his penis into the mouth of a dead shark with accompanying commentary which speaks of men "who crave sex from sharks" (T. 630) and a variety of material focusing on an interest in excrement. (T. 822-23).

The final prong of the Miller test examines "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Once again, the "taken as a whole" aspect of this examination must be conducted on a qualitative as opposed to a quantitative basis. Ginzburg v. United States, 383 U.S. 463, 466, n.5 (1966). If the other two prongs of the Miller test are satisfied "even one obscene item contained in a work would be sufficient to support a finding that the entire publication is obscene if "taken as a whole", the publication lacks serious value." Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1363, 1368 (5th Cir. 1980). In the present case, after making an independent review of the contents of the eleven magazines in question, the Georgia Court of Appeals found that they did indeed lack serious literary, artistic, political or scientific value. Flynt v. The State, 153 Ga. App. 232, 245, ___S.E.2d ___(1980). That court correctly applied the standards delineated by this Court in Miller v. California, supra, in finding the magazines in question obscene and in violation of Georgia law.

CONCLUSION

No sufficient reason having been presented, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three copies of this Brief for Respondent in Opposition upon the Petitioner by depositing three copies of the Brief in the United States mail, with proper address and adequate postage to:

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This 20th day of June, 1980.

/s/
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